Majority Voting: Acting in the Best Interest of Stockholders, or Following the Herd?

*By Donald R. Moody & J. Ammon Smartt**

In 2003 the Securities and Exchange Commission proposed a rule that would, under certain circumstances, allow stockholders greater access to proxy materials in director elections.[1] The proposal was supported by many institutional investors, but met with great opposition in the issuer community. To date, the SEC has not adopted the proposed rule.[2] Stockholder activists, however, continue to push for reform in director elections.

Historically, directors have almost always been elected under a plurality system. Since 2004, however, there has been a dramatic shift toward majority voting. As of February 2007, over 52% of S&P 500 companies, and over 45% of companies in the Fortune 500, adopted some variation of majority voting in director elections.[3] Feeding this trend, Delaware amended Sections 141 and 216 of its corporation law to address certain issues that arise in the context of majority voting.[4] Other states also have taken pro-active measures to ensure that applicable state laws do not conflict with the adoption of a majority voting standard.[5]

There are different variations of the majority voting standards adopted by companies, but, as a general rule, the principal difference between a majority voting standard and a plurality standard is the fact that a majority of votes are required to elect a director under a majority voting standard. This differs from a plurality standard in that, under a plurality standard, a director can be elected by any number of votes so long as the director receives more votes than any other director—even if the margin is a single vote.

This development has left management and the boards of directors at many companies wondering if they should adopt a majority voting standard, and, if so, what form to adopt. The answer to that question can be complicated, and will vary depending on the company and its stockholder constituency. This article addresses some of the more popular formulations of majority voting standards that corporations have adopted, the changes in Delaware law that have facilitated the adoption of majority voting, and some of the arguments for and against adopting a majority voting standard in director elections.

I. Majority Voting Standards

Companies have adopted various approaches in formulating a majority voting standard. Some have adopted policies,[6] while others have adopted bylaw amendments.[7] A few companies have amended their charters to provide for majority voting.[8] To date, variations of two majority voting models have emerged as the preferred approach by companies in addressing this issue. The majority voting systems adopted by Pfizer, Inc. and Intel Corporation are the best examples of the two models that have emerged.

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A. Pfizer

Pfizer, Inc. was one of the early adopters of a *policy* to provide for majority voting.[9] Pertinent portions of the policy are as follows:

> In an uncontested election, any nominee for Director who *receives a greater number of votes "withheld" from his or her election than votes "for"* such election (a "Majority Withheld Vote") shall promptly tender his or her resignation following certification of the shareholder vote.[10]

The Pfizer approach has come to be known as the "plurality-plus" or "modified plurality" model. This model proved attractive to many companies because adopting a policy, which can be easily amended by the board of directors, provides greater flexibility. The Pfizer model also proved attractive to companies because a director must resign only if the director receives more "withheld" votes than "for" votes. A "true" majority voting standard would require a director to be elected by an affirmative majority of all stockholders or votes cast.[11]

More recently, the attractiveness of the Pfizer model has diminished. Institutional Shareholder Services, which advises institutional holders on how to vote in shareholder votes, originally indicated that while it generally supported a move by companies to a true majority voting standard, it would also consider "meaningful and equivalent alternative[s]" to a true majority voting standard.[12] Under its guideline, ISS "looked for a policy that included at a minimum: articulation of the decision-making process, prompt disclosure, and independent director involvement."[13] Much to the dismay of many companies trying to appease their stockholder constituencies, only one company in 2006 met the ISS standards for an "alternative structure" to true majority voting.[14] Ultimately, ISS abandoned its original intent to accept "meaningful and equivalent alternative[s]" with a declaration that ISS would only consider supporting "true majority voting standard[s] that... include a majority default rule and modification of the Holdover Director Rule…."[15]

With this backdrop, many companies considered alternative models that went beyond the modified plurality exemplified by the Pfizer approach. Intel Corporation is one of the leading examples of a company that adopted an alternative to Pfizer's model by setting an early standard for what constitutes a true majority voting model.

B. Intel

Intel Corporation adopted a majority vote bylaw on January 19, 2006, and further amended it on January 18, 2007. Intel's bylaw currently reads, in pertinent part, as follows:

> [E]ach director shall be elected by the vote of the *majority of the votes cast* with respect to the director at any meeting for the election of directors at which a quorum is present, provided that if as of a date that is fourteen (14) days in advance of the date the corporation files its definitive proxy statement (regardless of whether or not thereafter revised or supplemented) with the Securities and Exchange Commission the number of nominees exceeds the number of directors to be elected, the directors shall

> be elected by the vote of a plurality of the shares represented in person or by proxy at any such meeting and entitled to vote on the election of directors. For purposes of this Section, a majority of the votes cast means that the number of shares voted "for" a director must exceed the number of votes cast "against" that director.[16]

The Intel model is considered a true majority voting standard because of the language requiring a "majority of the votes cast" to elect a director. Additionally, Intel adopted this model as a bylaw, as opposed to a policy, which makes it somewhat more difficult for the Intel Board of Directors to modify for the reasons discussed below.

During 2006, there was a significant increase in the number of companies choosing to adopt the Intel model over the Pfizer model. While difficult to predict, this trend towards true majority voting will likely continue. Notably, some companies are beginning to adopt bylaw provisions that explicitly provide that only the stockholders can amend the majority voting bylaw.[17] A smaller number of companies are addressing the concept of majority voting in their charters.[18]

C. Policy vs. Bylaw vs. Charter

If the ultimate goal of majority voting reform is to provide the stockholder with a greater voice in the direction of the companies in which they invest, it makes sense that stockholder activists would prefer the adoption of majority voting standards that are not easily changed by a board of directors. Most companies have adopted such standards through policies,[19] but an increasing number of companies are adopting bylaw amendments to incorporate majority voting in director elections.[20] As a general rule, bylaws can also be changed without stockholder approval. For public companies, however, any amendment to the bylaws must be disclosed to stockholders in a filing on SEC Form 8-K.[21] Therefore, a majority voting standard adopted by a public company pursuant to a bylaw amendment provides transparency, even though it may be modified in the future without stockholder approval. This transparency should provide a greater sense of stability to stockholders because a board of directors will think twice about amending its bylaws if the change must be made public. Transparency, however, does not translate into control by stockholders.

Some companies, despite the fact that state law allows boards of directors to amend bylaws without stockholder approval, are adopting bylaw provisions that provide that the majority-vote bylaw can not be changed without stockholder approval. Delaware recently amended Section 216 of the Delaware General Corporation Law to provide that "[a] bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors."[22] Obviously, either of these two scenarios gives the stockholders the ultimate say in when or how a majority voting bylaw should be amended or repealed.

A smaller number of companies are enshrining majority voting in their charters. Charter amendments generally require stockholder approval to be adopted.[23] ISS perceives the adoption of majority voting through a charter amendment to be an important component in achieving their "gold standard."[24]

Given that this trend toward majority voting is a recent phenomenon, a question that companies must grapple with when considering the adoption of a majority voting standard is whether to adopt a policy, bylaw, or charter amendment. There are many arguments for and against adopting a policy as opposed to a bylaw or a charter amendment. The ultimate determination of what is best for the company will depend upon a factual analysis after considering the totality of the circumstances surrounding the perceived need to adopt a majority voting policy.

For some companies, the flexibility of a policy may be more appropriate. For example, if a company is uncertain about the application of particular state laws, or if the company anticipates dealing with "empty voting" as described below, it may need the flexibility of a policy to act quickly in order to protect the overall interests of its stockholders. For other companies, particularly those that are targeted by stockholder activists, a charter or bylaw amendment might be the best fit in keeping with a company's corporate governance goals and stockholder constituency. For many companies, retention of the plurality standard in director elections may be the best alternative.

Undoubtedly, some companies have adopted majority voting standards to "follow the herd." Such a mentality on the part of management is rarely beneficial to stockholders. Where possible, companies should give the market time to develop the right approach. While ISS may recommend true majority voting coupled with a charter amendment, there are many questions as to how such a standard may affect the governance of that company.

II. Concerns with Majority Voting

With any major shift in corporate governance, there will always be uncertainty with respect to how those changes will affect the overall health of companies competing in the marketplace. The majority voting trend is no exception to that rule. Some examples that have already been identified include the holdover problem, compelled resignation of directors, broker non-votes, and general policy considerations as to the need for majority voting in the first place.

A. The Holdover Problem

Over 90% of the majority voting standards adopted by companies include a carve-out for contested elections.[25] Such a carve-out typically provides that in the event of a contested election the traditional plurality standard will apply.

The dynamics change in the majority voting paradigm for uncontested elections. Most state laws provide that a director "holds over" and remains in office until a "successor is elected and qualified."[26] But what happens in an *uncontested* election in the case of an incumbent director who receives more "withheld" votes than "for" votes, or who does not receive a majority of votes cast? Under the holdover rule, the director continues to stay in office until a successor is elected and qualified. Of course, the board of directors or stockholders can take action to call a special meeting to replace the director, but at what cost in terms of money and time? Moreover, how should the board of directors proceed if the director refuses to resign?

B. Director Resignation

Most companies have addressed the holdover issue by adopting policies or bylaws that indicate what action the board of directors and the incumbent director must take in the event of a failed election. Intel Corporation, for example, adopted in its January 19, 2006, bylaw amendment the following:

> If a director is not elected, the director shall offer to tender his or her resignation to the Board. The Corporate Governance and Nominating Committee will make a recommendation to the Board on whether to accept or reject the resignation, or whether other action should be taken. The Board will act on the Committee's recommendation and publicly disclose its decision and the rationale behind it within 90 days from the date of the certification of the election results. The director who tenders his or her resignation will not participate in the Board's decision….[27]

Intel, similar to many other companies, requires their directors to resign in the event of a failed election. In the Intel example, the board of directors also retains some discretion as to whether or not they will accept the mandatory resignation of the director. In 2007, Intel modified its bylaws and adopted a policy to require advance director resignations that become effective upon a failed election.[28]

Mandatory director resignations, however, have been the cause of some concern. Many have raised questions as to whether the requirement that a director resign is tantamount to director removal. Under the laws of many states, only stockholders can remove directors and then sometimes only for cause.[29] Delaware addressed this issue by amending Section 141 of the Delaware General Corporation Law. Section 141 now provides, in pertinent part, the following:

> A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable.[30]

As a result, Delaware corporations can require their directors to tender advance resignations contingent upon future events, and such resignations can be irrevocable.

Not all states have followed Delaware's lead. Consequently, any company considering adoption of a majority voting model must seriously consider the ramifications of failed director elections. For example, the practical reality that an incumbent director may refuse to resign in the context of an uncontested election must be taken into account. If the losing director is forced to resign, it is possible that a court could invalidate the board's decision depending on the wording of the director removal statute in the state in question. Moreover, even if state laws are modified to help companies deal with these issues, companies must also consider the internal political ramifications of asking sitting directors to tender advance resignations that may become irrevocable.[31]

Assuming a company adequately considers failed director elections and applicable state law supports a shift toward majority voting, other political and legal considerations remain. While requiring all directors to tender advance resignations contingent upon a failed election may solve the holdover problem, it does not necessarily address the broader issue of certain consequences that may follow once a director's resignation is accepted by the board of directors. For example, what if the director required to resign in a failed election is an independent director whom the board needs in order to comply with certain listing rules? What if the resigning director triggers a change in control provision in the corporation's debt instruments? What if the director is also the CEO (which may breach the CEO's employment agreement triggering significant severance payments)?

Intel's model addresses many of the questions that arise in the context of failed elections by giving the board discretion in considering the acceptance or rejection of a director's resignation in a failed election. Only time and experience will tell, however, if the models adopted most recently by companies, including Intel, will be sufficient to address all of the legal and practical challenges that may arise in the coming years.[32]

C. Broker Non-Votes

Recently the New York Stock Exchange proposed an amendment to its Rule 452, effective January 1, 2008, eliminating discretionary voting in director elections.[33] Under Rule 452, brokers can vote shares on "routine" matters in instances where the beneficial owner of the shares has not provided instructions on how to vote.[34] If the proposed amendment is approved by the Securities and Exchange Commission, director elections will no longer be considered "routine."[35]

This Rule 452 development is important because, historically, brokers followed management's recommendations on how to vote in director elections. Beginning in 2008, however, brokers may no longer be able to follow the advice of management in director elections if they have not received specific voting instructions from the beneficial owners of the shares. This opens the door to an increase in the potential number of failed elections, for several reasons. For example, under the Pfizer approach, a director could receive more "withheld" votes than "for" votes because of a failure of certain beneficial owners to provide instructions on how to vote. As such, the proposed amendment to Rule 452 is cause for some concern among companies considering adoption of a majority voting standard.

D. Policy Considerations in Majority Voting

Even if the standards adopted by most companies prove to be adequate in addressing many of the issues that arise in the context of majority voting, do the standards adopted adequately address relevant policy considerations, and will such standards prove to enhance stockholder value in the future? The discretion left to boards in both majority voting models to accept or reject the resignation of a director is one such consideration. The board can determine not to accept the resignation of a director, but must publicly disclose its reasons for so acting. Public disclosure, however, does not effectuate the vote of stockholders if the board decides to leave a director in office after a failed election. If the majority voting movement's purpose is to give a meaningful voice to the stockholders, what purpose does such a standard serve if the board can summarily determine not to honor the vote of the stockholders?

Recent developments in corporate law also call into

question whether a stockholder or a director is better situated to act in the overall best interests of the company. The quintessential corporate governance requirement that directors in a corporation owe a fiduciary duty to *all* of the stockholders should also be considered in the majority voting paradigm. Stockholders owe no such duty of loyalty or care to companies in which they invest. Historically, the assumption has been that stockholders will always act in the best interests of the company because at the end of the day the best interests of the company will yield the best stockholder returns. This assumption, however, has come under attack with recent developments in "empty voting" or "vote morphing."

On January 22, 2007, SEC Commissioner Paul S. Atkins highlighted the potential problems with "empty voting," or votes by stockholders that have no economic interest in the stock they vote.[36] Such trends highlight the potential undermining of the basic assumption that stockholders vote in their best economic interest. It also places a renewed emphasis on the fact that directors legally owe a fiduciary duty to *all* stockholders, not to certain segments or special interest groups found within certain stockholder constituencies. As applied to the majority voting paradigm, in some cases it may be better for a company to retain a director under a plurality standard, because of the applicable fiduciary duties that apply, instead of opening the board room to stockholders who may have no similar duty.

Another concern in adopting a majority voting standard is that of reducing the number of potential directors in the market. It is counterintuitive to expect that directors or potential directors will not react to the possibility that they may face potential ouster from a board of directors in fulfilling their fiduciary duties to a company. Such concerns among the potential director pool could further reduce the availability of potential directors from a pool that has already been diminished as a result of other market movements.[37] If a reduced director pool is one of the unanticipated results of majority voting, the potential for harm to companies generally could be significant. The goal of every company should be to attract the most qualified directors in the market. If the market yields sub-par directors, companies, and stockholders will pay the cost.

Some examples in the marketplace also demonstrate that the plurality system of previous years has been as effective as majority voting in giving a voice to stockholders. For example, in 2004, Disney replaced Michael Eisner as Chairman when 43% of votes were "withheld" for his election.[38] Merrill Lynch's general counsel summarized the effectiveness of a plurality standard as follows:

> I think that in today's environment, most Boards and managements are extremely sensitive to governance criticisms and the related ugly publicity, and will carefully analyze any significant withhold votes and the message behind it and consider the implications for a particular director's continued service.[39]

Others have similarly argued that stockholders already have the power to remove directors through different mechanisms by "calling special meetings, acting by written consent without meeting in person, or making a motion at the annual shareholder meeting."[40] All of this indicates that a majority voting standard may not be needed in the first place.

Moreover, on July 26, 2007, the SEC adopted a rule titled "Shareholder Choice Regarding Proxy Materials" that could significantly reduce the cost to stockholders in making proxy proposals, such as those that arise in the context of director elections, by expanding the use of the internet to lower the cost of proxy solicitations generally.[41] Because of the potential cost savings under the proposed rule, it could dramatically change the face of proxy challenges by empowering average stockholders with the ability to challenge management and boards of directors under the existing regulatory framework. As such, the policy argument that holds companies should support majority voting to give a greater voice to stockholders may no longer apply, because stockholders will be given a greater voice under the existing framework.

As a practical matter, there are also many companies that remain under the stockholder proposal radar and are not targeted by stockholder activists. As such, the pressure that other companies may feel to adopt a majority voting model may not apply. These companies have the ability to watch the market develop standards that will evolve into best practices. Directors at these companies can make a strong argument that, given the uncertainties in the development of majority voting standards, they are acting in the best interests of the company by waiting to see what will emerge as a best practice in the future.

While there are many elements that should give directors and management pause in considering a majority voting standard, there are other things that should be weighed in the balance to determine the best course for a particular company to follow. Majority voting, despite its uncertainties, may be the best choice for certain companies, depending on the circumstances.

III. Benefits to Majority Voting

Many reasons can be provided in support of majority voting in director elections. This debate is not new. In fact, Commissioner Atkins recently stated that "[t]he question of whether the SEC should mandate shareholder director nominations is one that goes back to the very formative years of the Commission."[42] Board accountability, pressure to adopt an emerging best practice, and the ability to preempt stockholder proposed majority voting standards are some reasons why a company may consider adopting a majority voting model. In addition, ISS considers it a positive factor in the corporate governance score it assigns to public companies.[43]

A. Board Accountability

Many have argued that majority voting gives stockholders a true voice in director elections and that it will cause directors to be more responsive to the needs of stockholders. To date, there is very little quantifiable evidence to support this claim as most of the majority voting models have been adopted recently so that there is not enough data.

Of course, some have also argued that directors are already paying attention even when a "withheld" vote may not be binding.[44] In a 2005 report, ISS observed that "[m]ost directors are highly dedicated and successful men and women who care about their integrity and their reputation. It is only natural that withhold votes, whether symbolic or legally binding, will matter a great deal to them."[45] This was exemplified by the Home Depot board meeting in May 2006 when approximately 30% of

shareholders withheld their votes for the election of ten directors in protest over the CEO's pay.[46] The Home Depot withhold campaign ultimately led to the ouster of Home Depot's CEO in January 2007.[47]

B. Preemption of Stockholder Proposals

One of the advantages directors and management have in the face of this trend towards majority voting is to define the models adopted. A number of the recently adopted majority voting models were adopted in the face of an imminent stockholder proposal.[48] There is no guarantee that pre-emptive action on the part of a board will preclude stockholder action, but it is a good-faith gesture to stockholders that the board is aware of stockholder concerns and is willing to give a voice to the stockholders in the resolution of those concerns. Such a gesture may be enough, depending on the stockholder constituency, to satisfy the demands of stockholders pushing for a majority voting standard, and simultaneously give directors and management more of a voice in determining what that standard will be.

Adding importance to this preemptive strategy, stockholder activists have begun to submit binding stockholder proposals calling for majority-vote bylaws. The Second Circuit ruled in September 2006 that these proposals could not be excluded on the basis that they relate to the election of directors.[49] Consequently, stockholders, at least in the Second Circuit, can now present proposals relating to majority voting bylaw amendments in proxy statements. The SEC, however, issued a proposed rule on July 27, 2007 to clarify its position and to amend the applicable rules to provide that such proposals "may be excluded... if [they]... result in an immediate election contest... *or* [if they] set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings."[50]

C. Best Practice

Given the number of companies that have already adopted majority voting models, one could argue that majority voting has already become an accepted best practice for U.S. public companies.[51] Importantly, however, many of the quirks associated with majority voting must be remedied through the trial of time and experience. Accordingly, boards are not, and should not, currently be required to adopt a majority voting model in all circumstances. But the day may not be that distant when majority voting becomes the default standard and boards will have to provide reasons as to why such a standard should not apply to their company.

Currently, the argument that all companies should adopt a majority voting model fits better under the "herd" mentality discussed above, given the related uncertainties. Once the majority voting models have been tried and tested, boards could be held to a new standard in corporate governance with respect to majority voting. All of this assumes, however, that once the market tests the current majority voting standards they remain viable in the marketplace.

Endnotes

1 SEC Release No. 34-48626 (Oct. 14, 2003).

2 On July 27, 2007, the SEC proposed another rule titled "Shareholder Proposals Relating to the Election of Directors" to amend Rule 14a-8(i)(8) and to clarify that such a proposal "may be excluded under Rule 14a-8(i)(8) if it would result in an immediate election contest . . . or would set up a process for shareholders to conduct an election contest in the future by requiring the company to include shareholders' director nominees in the company's proxy materials for subsequent meetings." SEC Release No. 34-56161 (July 27, 2007). This proposal was largely the result of the Second Circuit's ruling in AFSCME v. Am. Int'l Group, Inc., 462 F.3d 121. *See*, infra, note 49 and accompanying text.

3 Claudia H. Allen, *Study of Majority Voting in Director Elections* (Feb. 5, 2007) *at* http://www.ngelaw.com/files/upload/majority_callen_020707.pdf (last visited July 21, 2007).

4 The applicable portion of Section 141(b), as amended, provides:

> Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable.

8 Del. C. § 141(b) (2007). The applicable portion of Section 216 provides that "[a] bylaw amendment adopted by stockholders which specifies the votes that shall be necessary for the election of directors shall not be further amended or repealed by the board of directors." 8 Del. C. § 216 (2007).

5 *See*, e.g., Cal. Corp. Code § 708.5 (Deering 2007). *See also*, infra, note 31 and accompanying text discussing changes to the Model Business Corporation Act.

6 *See*, e.g., Pfizer, Inc., Corporate Governance: Principles, Item 7 *at* http://www.pfizer.com/pfizer/are/mn_investors_corporate_principles.jsp (last visited July 21, 2007).

7 *See*, e.g., Intel Corporation, Bylaws, Article III, Section 1, *available at* http://www.intel.com/intel/finance/docs/bylaws.pdf (last visited July 21, 2007).

8 *See*, e.g., Progress Energy, Inc. Form 10-Q filed with the SEC on August 9, 2006, *available at* http://www.sec.gov/Archives/edgar/data/17797/000109409306000296/form10-q212006.htm (last visited July 21, 2007). Progress Energy amended Article 5, Section 4 of its Articles of Incorporation to provide:

> [E]ach director shall be elected by a vote of the majority of the votes cast with respect to the director at any meeting for the election of directors at which a quorum is present, provided that if the number of nominees exceeds the number of directors to be elected, the directors shall be elected by a vote of the plurality of the shares represented in person or by proxy at any such meeting and entitled to vote on the election of directors. For purposes of this Section, a majority of the votes cast means that the number of shares voted "for" a director must exceed the number of votes cast "against" that director.

Id.

9 Pfizer adopted its policy on June 23, 2005. A copy of the policy is *available at* http://www.pfizer.com/pfizer/are/mn_investors_corporate_principles.jsp (last visited July 21, 2007).

10 *Id.* (emphasis added).

11 Most companies that have adopted a "true" majority voting standard require a majority of the votes cast as opposed to a majority of votes outstanding. *See* Allen, *supra*, note 3, at iii.

12 Institutional Shareholder Services, *Director Election Reforms*, (2006) *at* http://www.issproxy.com/pdf/DirectorElectionReform_CommentPeriod.pdf (last visited July 21, 2007).

13 *Id.*

14 *Id.*

15 *Id.*

16 Intel Corporation Form 8-K filed with the SEC on January 18, 2007 (emphasis added), *available at* http://www.sec.gov/Archives/edgar/data/50863/000005086307000009/exh31.txt (last visited July 21, 2007).

17 Allen, *supra*, note 3, at v.

18 Allen, *supra*, note 3, at ii.

19 Allen, *supra*, note 3, at i–vi.

20 Allen, *supra*, note 3, at i–ii.

21 *See* SEC Form 8-K, Item 5.03, *available at* http://www.aspenpublishers.com/secureredbox/crpfrm2.pdf (last visited July 21, 2007).

22 8 Del. C. § 216 (2007).

23 *See*, e.g., 8 Del. C. § 242 (2007).

24 Allen, *supra*, note 3, at ii.

25 Allen, *supra*, note 3, at iii.

26 *See*, e.g., 8 Del. C. § 141(b) (2007).

27 Intel Corporation Form 8-K filed with the SEC on January 19, 2006, *available at* http://www.sec.gov/Archives/edgar/data/50863/000005086306000007/exh31.txt (last visited July 21, 2007). In its Form 8-K filed on January 18, 2007 with the SEC, Intel modified its bylaws by removing a portion of the above referenced language and adopting the following policy:

> Director nominees annually submit a contingent resignation in writing to the Chairman of the Corporate Governance and Nominating Committee to address majority voting in director elections. The resignation becomes effective only if the Director fails to receive a sufficient number of votes for re-election at the Annual Meeting and the Board accepts the resignation.

Intel Corporation Board of Directors Guidelines on Significant Corporate Governance Issues, Board Composition: Advance Resignation to Address Majority Voting, *available at* http://www.intel.com/intel/finance/docs/Corp_Governance_Guidelines.pdf (last visited on July 21, 2007).

28 *See*, supra, note 27, and accompanying text.

29 *See*, e.g., 8 Del. C. § 141(k) (2007).

30 8 Del. C. § 141(b) (2007).

31 For further information on proposed amendments to the Model Business Corporation Act to address certain issues that arise in the context of majority voting, see *Changes in the Model Business Corporation Act—Amendments to Chapter 7 and Related Provisions Relating to Shareholder Action Without a Meeting, Chapters 8 and 10 Relating to Shareholder Voting for the Election of Directors, and Chapter 13, Relating to Appraisal and Other Remedies for Fundamental Transactions*, 61 Bus. Law 1427 (Aug. 2006).

32 Intel has already modified its original bylaw amendment adopted in January of 2006. *See supra*, note 27, and accompanying text.

33 NYSE Group, *NYSE Adopts Proxy Working Group Recommendation to Eliminate Broker Voting in 2008*, *at* http://www.nyse.com/press/1161166307645.html (last visited July 21, 2007).

34 *Id.*

35 *Id.*

36 Commissioner Atkins stated the following in a speech given to the Corporate Directors Forum in early 2007:

> Financial investors today can relatively easily and cheaply augment their voting power or alter voting results, even when they have no ownership interest in the corporation. In one example, a hedge fund owned a significant stake in a company targeted in a stock-for-stock tender offer. The hedge fund stood to profit greatly if the acquisition went through. However, dissident shareholders of the *acquiring* company were complaining that the deal was overpriced and should be abandoned.
>
> So what did this hedge fund do? It purchased a 9.9% stake of the *acquiring* company, but then entered into equity swaps and other transactions to eliminate any of its economic interest in the acquirer. Thus, you had a situation where this hedge fund could vote a significant block of the acquirer's shares to approve a transaction which would, in turn, benefit the hedge fund but arguably hurt the shareholders of the acquirer.

Commissioner Paul S. Atkins, Remarks at the Corporate Directors Forum 2007 (Jan. 22, 2007), *available at* http://www.sec.gov/news/speech/2007/spch012207psa.htm (last visited July 21, 2007)

37 Institutional Shareholder Services, *Majority Voting in Director Elections: From the Symbolic to the Democratic*, at 12 (2005), *available at* http://www.issproxy.com/pdf/MVwhitepaper.pdf (last visited July 21, 2007) (discussing the fact, among other things, that majority voting could affect the potential director pool).

38 Paul R. La Monica, *Eisner out as Disney* chair, CNNMoney.com, March 4, 2004, *at* http://money.cnn.com/2004/03/03/news/companies/disney/index.htm.

39 Institutional Shareholder Services, *Majority Voting in Director Elections: From the Symbolic to the Democratic*, at 14 (2005), *available at* http://www.issproxy.com/pdf/MVwhitepaper.pdf (last visited July 21, 2007).

40 *Id.*

41 *See* SEC Release No. 34-56135 (July 26, 2007). The Release states that "[b]y requiring Internet availability of proxy materials, the amendments are designed to enhance the ability of investors to make informed voting decisions and to expand use of the Internet to ultimately lower the costs of proxy solicitations." *Id.* at 7.

42 Commissioner Paul S. Atkins, Remarks at the Corporate Directors Forum 2007 (Jan. 22, 2007), *available at* http://www.sec.gov/news/speech/2007/spch012207psa.htm (last visited July 21, 2007).

43 Institutional Shareholder Services, *ISS US Corporate Governance Policy 2007 Updates* (2006) *at* http://www.issproxy.com/pdf/2007%20US%20Policy%20Update.pdf (last visited July 21, 2007).

44 *See supra*, note 39, and accompanying text.

45 Institutional Shareholder Services, *Majority Voting in Director Elections: From the Symbolic to the Democratic*, at iv (2005), *available at* http://www.issproxy.com/pdf/MVwhitepaper.pdf (last visited July 21, 2007).

46 *Activist Fund Takes on Home Depot*, The New York Times Deal Book, December 18, 2006, *at* http://dealbook.blogs.nytimes.com/2006/12/18/activist-fund-takes-on-home-depot/ (last visited August 4, 2007).

47 Parija B. Kavilanz, *Nardelli out at Home Depot*, CNNMoney.com, January 3, 2007, *at* http://money.cnn.com/2007/01/03/news/companies/home_depot/index.htm?postversion=2007010319 (last visited August 4, 2007).

48 Allen, *supr*a, note 3, at iv.

49 AFSCME v. Am. Int'l Group, Inc., 462 F.3d 121.

50 SEC Release No. 34-56161 (July 27, 2007).

51 *See supra*, note 3, and accompanying text.